beginning, properly formulated or constituted in the circumstances specified in paragraphs (3), (4) or (5), the defence of the Statute of Limitations would not have been available to the defendant; and accordingly, if in its discretion, the court thinks it just to grant leave to amend defects in the writ or pleading within the scope of the circumstances specified in these paragraphs, so that such defects in the proceedings are treated as having been cured *ab initio*, the defendant is not being deprived of the benefit of a defence which he would not have had if the proceedings had been so properly formulated or constituted in the first place. To contend in the cases specified in these paragraphs, that the defendant has an existing right which will be prejudiced by the amendment is to argue in a circle, since he only has an existing right if one presupposes that the court will not use its powers to amend under Order 20, rule 8, and Order 15 rules 6, 7 and 8 (see per Holroyd Pearce, L.J., in *Pontin* v. *Wood* [1962] 1 Q.B. at page 609.)"

It was plain to us that the amendment would introduce an entirely new cause of action in that it could not be said that it had arisen out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed by the Appellants. The Appellants had claimed as the indorsees or holders for value of and under four bills of lading which were numbered as KKS1, KKS3, KKS31 and KKS32 which were all dated October 10, 1979. The four claims were all in respect of four contracts of carriage by sea, the rights and title of which could be passed under the Bill of Lading Act, 1855. The mention of these contracts could not necessarily imply that there could be another claim of the Appellants under or in respect of another contract of carriage under another bill of lading which need not be identified; as such a claim would be implicit in or inferred from the endorsement in the writ under consideration. We were not unmindful that the amendment only sought to introduce a contract of carriage which was made for the same voyage by the same vessel and that the bill of lading bore the same date. We had also looked at the entire endorsement in the writ to see if a claim under bill of lading "KKS33" could be inferred. We could not stretch it to include such a claim. We were therefore of the view that the Appellants had failed to bring themselves within the scope of paragraph (5) of Order 20 rule 5. The Appellants were out of time in asserting their claim.

For the foregoing reasons, we for our own part agreed with the other member of the Court of Appeal and dismissed the appeal.

Appeal dismissed.

Solicitors: *Godwin & Co.; Drew & Napier.*

THE "EPAR"

THE "EPAR", OWNERS OF CARGO LADEN ON v. THE "EPAR", OWNERS OF

[O.C.J. (Kulasekaram J.) June 13, 1984]

[Singapore – Motion in Admiralty Suit No. 158 of 1980]

Shipping Law – Bills of lading – Claim for damage to cargo – Dispute as to convenient forum – Effect of exclusive choice of jurisdiction clause – Carriage of Goods by Sea Act, 1972, ss. 2 & 3, Arts. I, III, IV & X of Schedule.

Shipping Law – Bills of Lading – Application of Hague-Visby Rules.

Practice & Procedure – Application for stay of proceedings – Court's discretion.

Interpretation – Act and Rules scheduled to it – Adoption of purposive construction.

By a contract of carriage contained in 3 bills of lading dated June 27, 1978, the defendants contracted to carry on board the "Epar" 349 pallets of oil well drilling muds duly delivered to the defendants in good order and condition at Singapore and from thence to Belawan, Indonesia.

The present action arose as a result of the plaintiffs' claim against the defendants for damage done to 53 pallets of the said cargo. The defendants entered an unconditional appearance and contended, *inter alia*, that all further proceedings be stayed on the grounds that Indonesia was the more convenient forum and that the plaintiffs had agreed to submit all disputes arising from the said agreement for determination to the Court of Djakarta. The defendants relied on clause 17 of the bills of lading which states, "Any claim for loss, damage or short delivery or otherwise, arising out of this B/L, shall be dealt with, at the option of Pelayaran Nasional Indonesia in the court (Pengadilan Negeri) of Djakarta, to the exclusion of proceedings in any other court".

It was not disputed that if effect were given to the exclusive choice of jurisdiction clause and the claim was disputed in the court in Djakarta the maximum liability of the carrier to the shippers would be limited to a much smaller sum than what they would be liable to in Singapore under the Hague-Visby Rules.

Held, dismissing the defendants' application: (1) art. X r.1(a) and (b) of the Hague-Visby Rules apply to all bills of lading issued in Singapore;

(2) when a dispute arises between the parties as to their respective legal rights and duties under the contract and the dispute is one concerning the negligence, fault or failure of the carrier which they are unable to resolve by agreement and the carrier seeks to bring the exclusive jurisdiction clause into operation and to rely upon it and it is shown or accepted that the court in Djakarta – the chosen exclusive jurisdiction – would apply domestic substantive law which would result in limiting the carrier's liability to a lower sum than that to which he would be subjected under art. IV r.5(a) in Singapore, then art. III r.8 will come into play and the exclusive jurisdiction clause will be treated as if of no effect.

Cases referred to:

(1) *The Morviken* [1983] 1 Lloyd's Rep. 1.
(2) *The Eleftheria* [1969] 1 Lloyd's Rep. 237.
(3) *Amerco Timbers Pte. Ltd.* v. *Chatsworth Timber Corporation Pte. Ltd.* [1977] 2 M.L.J. 181.

MOTION IN ADMIRALTY.

A.B. Reddy for the plaintiffs.
V. Ramayah for the defendants.

Cur. Adv. Vult.

Kulasekaram J.: By a contract of carriage contained in three bills of lading numbered BEL45, 46 and 47 signed by and on behalf of the defendants and all dated June 27, 1978 the defendants contracted to carry on board their vessel "Epar" 349 pallets of oil well drilling muds duly delivered to the defendants in good order and condition at Singapore from the said port to Belawan, Indonesia.

The plaintiffs allege that the defendants, their servants or agents negligently and/or in breach of the said contract and/or in breach of their duty as bailees delivered 53 pallets of the said cargo damaged and claim damages for the damage and loss done to their said goods during the said voyage.

The Writ in this action was issued on March 24, 1980, served on the defendants on the September 27, 1980 and unconditional appearance to the action was entered by the defendants on September 30, 1980. The plaintiffs filed their statement of claim on April 21, 1981.

By a motion on April 29, 1981 the defendants applied for the following orders:–

1. that all further proceedings herein be stayed on the grounds that Indonesia is the more convenient forum and that the plaintiffs have agreed to refer and submit all disputes arising out of or in connection with the said agreement (in respect of which matters this action is brought) for determination to the court (Pengadilan Negeri) of Djakarta;
2. that in default this action be dismissed out of this honourable court;
3. that the plaintiffs do pay the defendants the cost of this action.

The Bills of Lading, contained *inter alia*, the following clauses which are relevant for considering the defendants' motion here:–

"9. ... if the value has not been declared in the Bill of Lading the Carrier is not bound to refund an amount exceeding £100/– per package.

16. Law applicable to this B/L. The B/L shall be governed by Indonesian Law, observant of the stipulations, laid down herein. The contents of this B/L must be considered as cancelled in so far as these contents are contrary to the stipulations of section 470 of the Commercial Code of Indonesia.

17. CLAIMS. In the event of delivery from warehouse, claims are to be lodged in writing not later than 3 (three) days after the last day of discharge (excluding Sundays and holidays). In case of delivery alongside the vessels or by ships, boats, claims are to be lodged at the time of discharge.

Any claim for loss, damage or short delivery or otherwise, arising out of this B/L, shall be dealt with, at the option of Pelayaran Nasional Indonesia in the court (Pengadilan Negeri) of Djakarta, to the exclusion of proceedings in any other court.

18. BILLS OF LADING ISSUED IN THE STATES OF MALAYA AND THE REPUBLIC OF SINGAPORE. The following clause will apply to Bills of Lading issued in the States of Malaya and the Republic of Singapore.

This Bill of Lading is to have effect subject to the provisions of the rules contained in the Schedule to the Carriage of Goods by Sea Ordinance 1927, herein –

Provided that

a) If any clause covenant or agreement herein in part contravenes the Rules and in other parts is capable of being construed so as not to contravene and is permissible under the Rules, such last mentioned part shall be deemed to be included in the agreement between the carrier and the shipper and that

b) Nothing contained in this Bill of Lading shall deprive the carriers of the right to claim the full benefit of all limitations of and exceptions from liability conferred on hire and/or the ship by the Carriage of Goods by Sea Ordinance 1927, the Rules, or otherwise under any law for the time."

The defendants in support of their motion assert by the terms of the contract of carriage which are embodied in the bills of lading and in particular clause 17 thereof which has already been set out above, the parties have agreed that any claim for loss, damage or short delivery or otherwise arising out of these bills of lading shall be dealt with at the option of Pelayaran Nasional Indonesia (Pelni), the owners of the vessel the defendants, in the court (Pengadilan Negeri) of Djakarta to the exclusion of proceedings in any other court. The defendants say the court in Singapore ought to give effect to this choice of forum clause by granting the stay.

The defendants further contend the court of Djakarta, Indonesia, is the most appropriate and

convenient forum for the resolution of the disputes between the parties in all the circumstances.

The plaintiffs dispute both these contentions of the defendant. The exclusive choice of jurisdiction clause should be treated as inoperative or of no effect here having regard to the House of Lords decision in *The Morviken*[1]. They also say the court in Singapore is the most appropriate forum and not the court in Djakarta.

It is however not in dispute that under section 3(1)(g) of the High Court (Admiralty Jurisdiction) Act which is in the following terms:–

"3(1) The Admiralty Jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims:–

(g) any claim for loss of or damage to goods carried in a ship;"

this court has jurisdiction to entertain the claim of the plaintiffs against the defendants.

Let me deal with the first issue. To answer this question we must consider the Carriage of Goods by Sea Act 1972 by which Singapore ratified the Brussels Protocol of 1968 amending the Hague Rules, commonly known as the Hague-Visby Rules which are scheduled to the 1972 Act – as did the U.K. Carriage of Goods by Sea Act 1971 in U.K. – and the effect it has on the exclusive choice of jurisdiction clause here –

"The Hague-Visby Rules modify the Hague Rules in several relevant respects and in particular by the new art. IV(5) they provide a higher maximum monetary liability of a carrier to a shipper or consignee in damages for any negligence or breach of contract for which the carrier is not relieved from liability under art. IV ....."

Lord Diplock in delivering the judgment of the House of Lords in *The Morviken (supra)* considered a similar exclusive jurisdiction clause in a Bill of Lading – contract of carriage – and held that it was "of no effect" as it violated the provisions of the U.K. Carriage of Goods by Sea Act 1971 and the Hague-Visby Rules contained therein.

He said in construing the Act and the Rules scheduled to it, "they should be given a purposive rather than a narrow literalistic construction, particularly wherever the adoption of a literalistic construction would enable the stated purpose of the international convention, *viz.* the unification of the contracting States relating to bills of lading, to be evaded by the use of colourable devices that, not being expressly referred to in the rules, are not specifically prohibited".

It is settled law that in these circumstances irrespective of what the answer is on the first issue whether there is an exclusive choice of jurisdiction clause or not, this court has a discretion whether or not to grant a stay and it is also settled law what factors should be taken into consideration in exercising that discretion.

If the answer to the first issue is "Yes" then the second question arises, which is: Have the plaintiffs shown a strong case why this court should not exercise its discretion and grant a stay. In other words have the plaintiffs shown exceptional circumstances why a stay should not be granted. (For how this discretion is to be exercised see *The Eleftheria,*[2] and *Amerco Timbers Pte Ltd* v. *Chatsworth Timber, Corporation Pte Ltd.*[3]).

If the answer to the first issue is "No" the next question to be considered is: Have the defendants satisfied the court (a) that there is another forum (namely the court at Djakarta) to whose jurisdiction they are amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) that a stay would not deprive the plaintiffs of a legitimate personal or judicial advantage which would be available to them in this court.

It is convenient first to set out the relevant provisions of the Carriage of Goods by Sea Act 1972 and the relevant provisions of the Rules in the Schedule to the Act.

"THE CARRIAGE OF GOODS BY SEA ACT 1972

Section 2.

2. In this Act, "the Rules" means the International Convention for the unification of certain rules of law relating to bills of lading made at Brussels on August 25, 1924, as amended by the Protocol made at Brussels on February 23, 1968, and which are set out in the Schedule to this Act.

Section 3

3(1) Subject to the provisions of this Act, the Rules have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Singapore to any other port whether in or outside Singapore."

The relevant provisions of the Rules in the Schedule to the Act are set out below:–

"ARTICLE I

In these Rules the following words are employed, with the meanings set out below:–

(a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

ARTICLE III

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to –

(a) make the ship seaworthy;

(b) properly man, equip and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

ARTICLE IV

5(a). Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs per package or unit of 30 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher."

As regards Article IV Rule 5(a) it is also necessary and relevant to refer to Subsidiary Legislation S No. 172/82 which is as follows:–

"THE CARRIAGE OF GOODS BY SEA (SINGAPORE CURRENCY EQUIVALENTS) ORDER, 1982.

In exercise of the powers conferred by section 3(2) of the Carriage of Goods by Sea Act, 1972, the Minister for Trade and Industry hereby makes the following Order:–

1. This Order may be cited as the Carriage of Goods by Sea (Singapore Currency Equivalents) Order, 1982, and shall come into operation on 25th day of June, 1982.

2. For the purposes of paragraph 5 of Article IV of the Rules and of Article IV bis of the Rules set out in the Schedule to the Act, one thousand five hundred and sixty-three dollars and sixty-five cents and four dollars and sixty-nine cents are hereby specified as the amounts which shall be taken as equivalent to 10,000 gold francs and 30 gold francs respectively."

"ARTICLE X

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

(a) the bill of lading is issued in a contracting State, or

(b) the carriage is from a port in a contracting State, or

(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person."

It can be seen that under Art. IV, Rule 5(a) of the Hague-Visby Rules the maximum liability of a carrier to a shipper for any loss or damage to or in connection with goods shipped is an amount not exceeding the equivalent of 10,000 francs per package or unit, or 30 francs per kilo of gross weight of the goods lost or damaged whichever is higher and the respective equivalent figures in Singapore are $1,563.65 per package or $4.69 per kilo.

If this claim was tried in the court in Djakarta it would apply Indonesian law where the liability of a carrier which can be fixed by the contract under the Civil Code No. 470 at 600 Dutch guilders per package or more and the corresponding amount fixed in Djakarta is 600 rupiahs or more which in Singapore currency would be about $400/– and about $13.00. Under clause 9 of the bill of lading here the maximum liability of the carrier was fixed at £100/– per package. Under the Hague Rules of 1924 which were incorporated into the contract of carriage the maximum liability of a carrier was much less than what was provided under the Hague-Visby Rules.

It is not seriously in dispute that if effect were given to the exclusive choice of jurisdiction clause and the claim was disputed in the court in Djakarta the maximum liability of the carriers to the shippers would be limited to a much smaller sum

than what they would be liable to in Singapore under the Hague-Visby Rules. In other words the shipper's or consignee's claim in our instant case here would be subjected to a maximum limit which is very much lower than the maximum to which it would be subjected to in Singapore.

In our instant case having regard to the provisions of Art. X(a) and (b), these bills of lading are subject to the provisions of the Hague-Visby Rules. Under Art. IV Rule 5(a) the limits of the maximum liability of the carrier (the shipowner) to the plaintiffs' claim would be as provided there.

What is the effect of the exclusive choice of jurisdiction clause which in our case gives exclusive jurisdiction to the court at Djakarta, having regard to the provisions of Art. III Rule 8 of the Hague-Visby Rules. *Ex facie* this does not offend against Art. III Rule 8. However as in our case when a dispute arises between the parties as to their respective legal rights and duties under the contract and the dispute is one concerning the negligence, fault or failure of the carrier which they are unable to resolve by agreement and the carrier seeks to bring the clause into operation and to rely upon it and it is shown or accepted that the court in Djakarta – the chosen exclusive jurisdiction – would apply domestic substantive law which would result in limiting the carrier's liability to a lower sum than that to which he would be subjected to under Art. IV Rule 5(a) in Singapore, then Art. III Rule 8 will come into play and the exclusive jurisdiction clause will be treated as if of no effect.

The defendants however submit that our Carriage of Goods by Sea Act 1972 is not in the same terms as the U.K. Carriage of Goods by Sea Act 1971 where it is provided in the Act that the Hague-Visby Rules in the Schedule to the Act shall have the force of law.

It is submitted by the defendants that this is because Parliament wanted to preserve the freedom for the parties to contract outside the Act and the exclusive jurisdiction clause is not affected by the Hague-Visby Rules and effect must be given to that clause.

Such a construction I find would ignore the provisions of Art. X Rule 1(a) and (b) of the Rules that they apply to all bills of lading issued in Singapore. Such a construction will also be contrary to the stated purpose of the international convention, *viz.* the unification of the domestic laws of the contracting States.

I am also guided by what Lord Diplock said in *The Morviken (supra):*–

> '... The only sensible meaning to be given to the description of provisions in contracts of carriage which are rendered "null and void and of no effect" by this rule is one which would embrace every provision in a contract of carriage which, if it were applied, would have the effect of lessening the carrier's liability otherwise than as provided in the rules."

I therefore rule that the choice of exclusive jurisdiction clause giving the court in Djakarta exclusive jurisdiction is rendered null and void and of no effect. In these circumstances the defendants to succeed in their motion for a stay of proceedings here must satisfy two conditions as I have stated earlier and they clearly do not satisfy the condition that a stay would not deprive the plaintiffs of a legitimate personal or judicial advantage which would be available to them in this court.

For these reasons the motion of the defendants failed here and the stay of proceedings is refused. The defendants shall pay the costs of this motion.

I would like to add that on the preliminary point taken by the plaintiffs, that since the defendants had not entered a conditional appearance, they had submitted to the jurisdiction of this court. I would rule against that submission as the application here is not to set aside the Writ and service but an application for stay of proceedings. See remarks of Brandon J. (as he then was) in *The Eleftheria, (supra)* at p. 240.

Application dismissed.

Solicitors: *Niru & Co.; Wee & Ramayah.*

SEE AH HWA & ANOR. v. ONG HOCK THIAN & ANOR.

[O.C.J. (Lai Kew Chai J.) September 12, 1984]
[Singapore – Suit No. 4703 of 1983]

Damages – Fatal accident – Deceased aged 22 working for sub-contractor – Basic pay of about $600 per month – Whether multiplicand of $530 p.m. too high.

This is an appeal against the assessments of the learned Assistant Registrar who allowed $95,000 for loss of earnings using the multiplicand of $530 p.m. over a multiplier